BRB No. 99-1223 BLA

SAMMIE LATINOVICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (McNamar, Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Laura M. Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (95-BLA-2506) of Administrative Law Judge Rudolf L. Jansen on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case has been

before the Board previously and involves a duplicate claim.[1] On remand, the

[1]In its previous decision in this case, the Board affirmed the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) as they were unchallenged on appeal and the finding that the CT scan evidence did not establish pneumoconiosis. The Board vacated the administrative law judge's findings pursuant to 20 C.F.R.§718.202(a)(4), however, because the administrative law judge erred in according diminished weight to the opinions of Drs. Garcia and Combs because they relied on positive x-ray interpretations, in making a medical determination with respect to Dr. Combs'1994 opinion, and in failing to consider Dr. Garcia's qualifications. The Board also vacated the findings at 20 C.F.R. §718.204(c)(4), as the administrative law judge failed to consider Dr. Combs's 1992 opinion with the exertional requirements of claimant's usual coal mine employment and did not consider Dr. Garcia's qualifications or expressly state the relative weight he was according the physician's opinion. Lastly, the Board vacated the administrative law judge's determination that claimant established a material change in conditions as the administrative law judge did not consider all of the relevant evidence and erroneously found that three of the newly submitted pulmonary function studies yielded qualifying results. *Latinovich v. Zeigler Coal Co.*, BRB No. 98-0746 BLA (Mar. 30, 1999)(unpub.).

administrative law judge considered the evidence submitted subsequent to the previous denial of benefits on January 25, 1993, and found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 by establishing that he now suffered from pneumoconiosis or total respiratory disability. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in his weighing of the medical opinion evidence. Employer responds, urging affirmance. Claimant filed a reply brief, restating his position that he has established his entitlement to benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

At Section 718.202(a)(4), claimant contends that the administrative law judge should have accorded determinative weight to Dr. Garcia's opinion on the basis of his credentials and that the administrative law judge erred in finding that Dr. Garcia's opinion was equivocal.[2] Claimant's Brief at 6-9. We disagree. In determining that Dr. Garcia's opinion is entitled to little weight, the administrative law judge rationally found that Dr. Garcia's opinion, that "it is likely that Mr. Latinovich has evidence of coal workers pneumoconiosis," is an equivocal diagnosis of the disease, and is therefore insufficient to establish the existence of pneumoconiosis. *See generally Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order on Remand at 4; Claimant's Exhibit 1.

We also reject claimant's contention that the administrative law judge erred in crediting Dr. Cook's opinion and should have accorded determinative weight to Dr. Combs's opinion at Section 718.202(a)(4). Claimant's Brief at 8 - 11. The administrative law judge did, in fact, find that Dr. Combs's opinion, that claimant

[2]Claimant contends that Dr. Garcia possesses board-certification in three specialties, while Drs. Tuteur and Fino are only board-certified in two, and that Dr. Garcia is "arguably" the top pulmonologist in the country. Inasmuch as the administrative law judge acted within his discretion in finding that Dr. Garcia's opinion is entitled to little weight because it is equivocal, Dr. Garcia's qualifications are not relevant.

suffers from "coal dust induced disease of the lungs," is well reasoned and documented. Decision and Order on Remand at 4. However, the administrative law judge permissibly found this opinion to be outweighed by the contrary opinions of Drs. Cook, Fino and Tuteur because the physicians hold "multiple board certifications in relevant fields," because Drs. Cook and Fino additionally explained their opinions in deposition testimony, and because Dr. Combs' credentials are not contained in the record. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order on Remand at 4; Employer's Exhibit 12, 14, 18, 21, 22; Director's Exhibit 15. Thus, as the administrative law judge offered valid explanations for his decision to accord diminished weight to the opinions of Drs. Garcia and Combs, and properly accorded greater weight to the opinions of Drs. Cook, Fino and Tuteur, we affirm his determination that the new medical opinions do not establish the existence of pneumoconiosis.

Next, at Section 718.204(c), claimant contends that the administrative law judge mischaracterized Dr. Tuteur's opinion, erred in finding that the contrary probative evidence outweighs the qualifying blood gas study, and should have accorded determinative weight to the opinions of Drs. Combs and Garcia, that claimant is totally disabled due to pneumoconiosis. Claimant's Brief at 5-6, 12-18. After review of the administrative law judge's findings, we conclude that the administrative law judge committed no reversible error in his consideration of the relevant evidence. The administrative law judge found that although Dr. Garcia is a board-certified physician, his opinion is entitled to less weight because he did not review the record, did not explain the fluctuations in claimant's arterial blood gas and pulmonary function studies, and did not address how claimant's hypertension and medications affected his respiratory and pulmonary condition. *See Dillon*, *supra*. The administrative law judge found Dr. Cook's opinion entitled to the greatest weight as the physician is highly qualified, his opinion is consistent with the objective medical evidence, he examined claimant twice, he fully explained his reports in his deposition testimony, and his opinions are supported by Drs. Fino and Tuteur, who are also highly qualified. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order on Remand at 3.

Contrary to claimant's contention, the administrative law judge properly declined to discuss Dr. Combs' opinions regarding the issue of claimant's total disability. We previously affirmed the administrative law judge's determination that Dr. Comb's 1994 opinion is entitled to less weight on the issue of total disability as it was not supported by its underlying documentation. *Latinovich v, Zeigler Coal Co.*, BRB No. 98-0746 BLA (Mar. 30, 1999)(unpub.), slip op at 7.

Moreover, Dr. Combs' 1992 opinion is not part of the new evidence submitted with claimant's duplicate claim, and therefore is insufficient to demonstrate whether claimant has established a material change in conditions. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc*); *Sahara Coal Co. v. Director, OWCP* [McNew], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).

We also reject claimant's contention that the administrative law judge erred in his characterization of Dr. Tuteur's opinion. On July 30, 1997, Dr. Tuteur conducted an independent medical review and concluded that claimant has a mild respiratory impairment of an obstructive nature, unrelated to his coal mine employment. The physician additionally stated that:

> By virtue of the history of his exercise limitation, on the most contemporaneously relevant studies in a man now 73 years old, he clearly is unable to perform the tasks of a coal miner or work requiring similar effort. On this basis, he is totally disabled. Yet, this total disability is not due, even in part, to coal workers' pneumoconiosis or any other coal-mine-dust-induced-disease process.

Employer's Exhibit 18. Inasmuch as it is unclear from Dr. Tuteur's opinion that he rendered a diagnosis of total respiratory or pulmonary disability, the administrative law judge rationally concluded that Dr. Tuteur's opinion did not support claimant's burden under Section 718.204(c)(4). *See Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990); *Beatty v. Danri Corp. & Triangle Enterprises*, 16 BLR 1-11 (1991). Therefore, we affirm the administrative law judge's finding that Dr. Cook's opinion, that claimant had no objective evidence of pneumoconiosis and had essentially normal lung function, was entitled to the greatest weight, as it was supported by Drs. Fino and Tuteur, both highly qualified physicians, and because it was better reasoned and better supported by the objective medical evidence than the contrary opinion of Dr. Garcia. *See Clark*, *supra*; *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Director's Exhibit 15; Employer's Exhibit 12, 18, 21, 22; Claimant's Exhibit 1.

Lastly, we reject claimant's contention that he established total disability by blood gas study evidence. The administrative law judge properly weighed all of the like and unlike evidence at Section 718.204(c) to find that claimant did not carry his burden and that the only qualifying blood gas study was outweighed by the more persuasive medical opinions in the record, the pulmonary function studies and the vast majority of the arterial blood gas studies. *See Clark, supra*; *Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, *supra*; *Anderson v. Valley of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge properly considered the evidence pursuant to Sections 718.202(a)(4) and 718.204(c), we affirm his finding that claimant failed to establish a material change in conditions pursuant to Section 725.309. *See Spese*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge